

NO. 49186-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANE DOE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE
and DAKOTA LOOMIS,

Respondents.

RESPONSE TO APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Jane Doe (Doe) is a former employee of the Washington State Department of Fish and Wildlife (WDFW). Her name appears on numerous pages of WDFW's investigative records regarding a sexual harassment investigation. Roughly 30 other WDFW employee names also appeared in the same investigative records. Following WDFW's receipt of a public records request, Doe moved for an injunction to require the redaction of every reference to her name and association to other WDFW employees. The trial court denied her sweeping request, finding that many references did not fall within a legitimate "privacy right" as defined in RCW 42.56.050. The trial court exercised its discretion consistent with the language of the Public Records Act (PRA), chapter 42.56 RCW, and with case law interpreting the PRA. This Court should affirm the trial court.

II. ISSUES

1. Did the trial court err in determining that Jane Doe's identity need not be redacted everywhere it appeared in the requested records?
2. Does RCW 42.56.540 allow the trial court to order a permanent injunction that bars the release of public records to any and all future, unknown public record requests?
3. Did the trial court abuse its discretion in denying Jane Doe's request for attorney's fees?

III. COUNTER STATEMENT OF FACTS

A. Because of Her Position in WDFW and Personal Relationships, Jane Doe's Name Appears in Records Connected to the Schirato/Larson Sexual Harassment Investigation

In January 2015, WDFW received sexual harassment cross complaints from two of its agency executives, Greg Schirato (Schirato) and Ann Larson (Larson). Clerk's Papers (CP) at 357. Larson and Schirato each claimed to have been sexually harassed by the other. WDFW also learned that Schirato was under criminal investigation for burglary and rape charges against Larson and that she had obtained a restraining order against him. CP at 82, 84. With this information, WDFW decided to place Schirato on home assignment beginning January 15, 2015, until the matter could be fully investigated. CP at 82.

By February 20, 2015, WDFW decided to hire outside counsel to investigate the sexual harassment allegations. It retained MFR Law Group, PLLC (MFR) to complete a full and independent investigation.¹ CP at 82. MFR immediately began its investigation, ultimately interviewing 30 witnesses.² CP at 359.

Although Schirato and Larson were the subjects of the investigation, the names of many other WDFW employees appeared in the

¹ A complete and un-redacted copy of MFR's investigative report can be found in CP at 354-385. This report was sealed by order of the trial court. CP at 437.

² During its investigation, MFR learned of other sexual harassment allegations against Mr. Schirato from other employees within WDFW. CP at 358.

investigative records, including that of Jane Doe, the appellant here. CP at 357. Doe's name appeared primarily due to her relationship with Schirato and secondarily due to her relationship with Larson. CP at 364.

MFR's investigation revealed that Schirato and Larson engaged in a sexualized banter both in and out of the workplace. CP at 358. Schirato's sexualized talk also spread to other employees within WDFW. CP at 357. Although he claimed to have drawn a "bright line" between appropriate work discussions versus weekend sexual exploits (CP at 372), multiple WDFW employees provided testimony to the opposite. CP at 372. MFR did not find Schirato's "bright line" explanation credible. CP at 372. The record is replete with instances of Schirato sharing his weekend escapades with co-workers. *See* CP at 373 and 466.

Within the investigative records, there appears to be no recorded instance where Doe discouraged Schirato from sharing stories about her, whether embarrassing or otherwise. To the contrary, the investigative records suggest that Doe herself also encouraged a sexualized environment. For instance, Schirato told of one time Doe singled out a WDFW employee and commented on that employee's physical attribute. CP at 374.

B. Doe Petitioned for a Temporary Injunction to Prevent Release of the Schirato/Larson Investigation

Upon completion of the MFR investigation, Schirato received an un-redacted version of the investigative records pursuant to the employee discipline process. CP at 294. Shortly thereafter, WDFW received a public records request for this information, but Doe never contested its release. CP at 176. Prior to its release, WDFW redacted the information it believed to be covered by the exemptions in the PRA. CP at 63 and 176. Thereafter, WDFW received another request (the Loomis request) for the Schirato/Larson investigative records. CP at 62. When notified of this subsequent request, Doe moved for an injunction to require redaction of the requested records to protect her alleged privacy interest. CP at 8-28.

Doe initially proposed sweeping redactions to the records WDFW identified as responsive to the Loomis request, asking that “every reference to [Doe’s] identity, whether by name or by relationship or association be removed from the record.” CP at 111. She also suggested some of the identified documents could be destroyed. CP at 174. WDFW refused to destroy records in violation of RCW 42.56.100. CP at 174, 182. WDFW also declined to make the sweeping redactions Doe proposed—not because of any desire to retaliate against or embarrass Doe,³ but

³ Doe highlights an email from WDFW’s counsel that she argues demonstrates WDFW’s animus towards her. CP at 223. Her argument is misplaced. WDFW’s counsel

because WDFW understood the PRA to require release of the information Doe sought to have redacted. CP at 223. If WDFW improperly withheld or redacted that information, it could be subject to penalties for the wrongful withholding of information under RCW 42.56.550(4). CP at 35.

C. Doe's Counsel Intentionally Prolonged Resolution of Doe's Case

On December 2, 2015, Doe filed a Complaint for Declaratory and Injunctive Relief (Complaint) to prevent release of the Schirato/Larson investigative records to Loomis. CP at 5-7. That same day, the trial court issued a Temporary Restraining Order (TRO) in favor of Doe. CP at 44. Thereafter, Doe and Loomis (the requester) entered into a stipulated injunction making the previously proposed redactions that WDFW had rejected and applying the injunction to all future requesters of the same records. CP at 66. WDFW refused to sign the stipulated injunction, because it considered its "all future requesters" provision to be unenforceable. CP at 53. Doe was unwilling to accept anything short of agreement to all terms in the proposed stipulated injunction. CP at 215.

On December 11, 2015, the superior court heard argument on the Complaint. The court concluded Doe had failed to meet her burden for a

was merely pointing out that WDFW was forced into dealing with a newly created public record regardless of whether every allegation was true. Moreover, when that email was written, Doe had conceded that some, but not all, of the allegations mentioned about her in the report were false. CP at 10. True allegations could not have been withheld under RCW 42.56.050.

permanent injunction, but extended the preliminary injunction for another six weeks. CP at 79. Also, the court instructed counsel for WDFW to inquire whether Loomis would amend his public records request to align with the stipulation he signed, which appeared to state that he did not object to Doe's proposed redactions. Verbatim Report of Proceedings (VRP) 8:25-9:7 and 11:7-10, Jan. 15, 2016. Doe's counsel raised no objections to the court's instructions. VRP 10:25-11:6, Jan. 15, 2016.

When WDFW contacted Loomis, as instructed by the court, he agreed to forward an amended request to WDFW that aligned with Doe's proposed redactions as referenced in the stipulated injunction. CP at 123, 125. He also stated that he was not in possession of Doe's proposed redactions. CP at 125. But when WDFW's counsel notified Doe's counsel of Loomis' response, CP at 127, Doe's counsel accused WDFW's counsel of surreptitiously trying to moot Doe's case by inappropriate tactics and insisted that Loomis not amend his request. CP at 129. Loomis followed the direction of Doe's counsel and never amended his request.

With no agreement to resolve Doe's case, the parties appeared a third time in superior court, this time on a renewed motion for a permanent injunction. CP at 134. The court indicated on the record its displeasure with Doe's counsel's direct interference into a matter that had been within

reach of a resolution, that WDFW's counsel had done exactly what the court expected, and that Doe's counsel's actions were in direct conflict with what had been discussed at the previous hearing without objection. VRP 10:24-11:2-13, 25:6-15, Jan. 15, 2016. Also, the court expressed its concern that Doe's counsel was merely trying to keep a matter alive when there was no real case in controversy. VRP 11:21-23, Jan. 15, 2016.

At this same hearing, WDFW's counsel informed the Court of a possible conflict that Doe's counsel may have developed. In an email communication, Doe's counsel claimed to represent Mr. Arthur West, who was requesting some of the very same records Doe was seeking to protect from release to the public.⁴ WDFW argued that Doe's and West's claims are in direct opposition to each other. VRP 13:25-14:11, Jan. 15, 2016.

In concluding this third hearing, the court agreed to issue another preliminary injunction and directed the parties to again make contact with Loomis to see if he would align his request consistent with the stipulation he signed. The court specifically admonished both counsel that they were not to "pressure [Loomis]" into taking a particular position and instructed the parties to file declarations confirming that no pressure had been placed upon Loomis. The court specifically told Doe's counsel to, "rescind his

⁴ This email contained West's request for the Schirato/Larson investigative report and in particular, a page within that report known by WDFW to be CP at 448. The page revealed the name of Doe, her title within WDFW and her relationship to Schirato. The communication also made a monetary demand of settlement.

pressure that he placed upon Mr. Loomis to, in my view, act inconsistent with his prior stipulation.” VRP 27:19-21, Jan. 15, 2016.

D. Doe’s Counsel Disregarded the January 15, 2016, Trial Court’s Oral Ruling Concerning Contact with Loomis

Within hours of the court’s January 15, 2016, oral ruling, Doe’s counsel sent Loomis an email insisting that he not amend his November 6, 2015, PRA request. CP at 238. WDFW’s counsel advised Doe’s counsel that his recent communication with Loomis appeared to be in contempt of the trial court’s ruling and that counsel were directed to remain neutral in conversations with him. CP at 223. Doe’s counsel was again reminded of this on March 1, 2016, just prior to a conference call with Loomis. CP at 232-236. Nevertheless, Doe’s counsel vigorously argued to Loomis in the conference call that he should not amend his PRA request because that would moot Doe’s case. CP at 234-235.

E. The Trial Court Reviewed the Disputed Schirato/Larson Investigative Records *In Camera*

By April 2016, the parties had appeared in the trial court five different times because of Doe’s repeated attempts to obtain a permanent injunction. VRP 3:12, April 29, 2016. In each appearance, Doe provided the court only small samples of the record she wished to be redacted. CP at 80 and 169. WDFW argued that these small samples could not provide the court sufficient justification for granting all redactions Doe

sought, and that the court must view the context of each redaction as it appears on the various pages of the record. CP at 254. The trial court agreed with WDFW's argument and asked Doe to provide all disputed records for an *in camera* review. CP at 262-63. The parties provided the court with three sets of documents: (1) a clean copy of MFR's investigative report with no redactions CP at 354-385; (2) WDFW's proposed redactions to the MFR investigative report, a copy of Schirato's pre-disciplinary letter, and a copy of Schirato's disciplinary letter CP at 387-433⁵; and (3) 141 pages from various documents created by MFR's investigation that contained Doe's proposed redactions. CP at 438-579.⁶

F. Many of the 141 Pages Provided to the Court for Its *In Camera* Review Were Duplicates but Have Different Redactions

Many of the 141 pages received by the trial court for the *in camera* review contained duplicate pages with differing redactions. *See* CP at 439-41. Not all of the 141 pages were intended to be given to Loomis in their current form. CP at 295. This is especially true for those duplicate pages that have no redactions, but its matching page is heavily redacted with WDFW approved redactions. *Compare* CP at 439 with CP at 440.

⁵ WDFW's redactions are identified by a space in the text with a bracketed redaction code. For example, *see* CP at 407 and the first line on that page. You will see "[4a]". That code refers to a specific statutory exemption and the basis for applying that exemption, as set out in a key provided to the requester with the redacted documents.

⁶ Doe's redactions are identified by hand-written boxes around the typed text. For example, *see* CP at 439, second full paragraph, third line into that paragraph. You will see "your wife" in a hand-written box.

In November 2015, WDFW noticed the discrepancies and discussed them with Doe's counsel. At the time, WDFW thought that Doe had mixed-up the documents she received from her public records request with those received by Schirato through his discipline process (which were provided without redactions). CP at 297. Because of Doe's relationship to Schirato, WDFW believed a co-mingling of her records with those of Schirato's was a reasonable explanation for the discrepancies. However, by mid-April 2016, WDFW determined it was the source of the inconsistently redacted pages. CP at 294.

In an effort to assist the trial court in determining what redactions should be approved, Doe created an Excel spreadsheet that organized the 141 pages of disputed redactions. CP at 265, 270-81. Once WDFW realized how Doe came into possession of the inconsistent pages of redactions, counsel for WDFW color-coded the Excel spreadsheet to distinguish what pages WDFW intended to provide from those it never intended to provide Loomis: (1) the highlighted blue pages were never intended to be given to Loomis; (2) the color green identified a page that would be provided to Loomis; and (3) the color yellow identified the pages that would be replaced by WDFW.⁷ CP at 295, 299-304 (*See* color-coded copy in Appendix A).

⁷ Replacement of the yellow-coded pages was determined necessary because no correctly redacted version of the particular page was contained in the existing 141 pages.

G. The Trial Court Did Not Grant All the Redactions Doe Proposed and Remained Silent as to Whether the Injunction Applied to All Future Requesters

At the sixth hearing, on April 29, 2016, the trial court ruled on the merits of the case. In its ruling, the court again mentioned how troubled it was that, “[Doe’s counsel] subsequently urged Mr. Loomis not to modify his request” VRP 5:15-16, April 29, 2016. After reviewing the subject 141 pages *in camera*, the court ruled that not all of Doe’s suggested redactions were permitted under RCW 42.56.050. VRP 9:21-10:7, April 29, 2016. The trial court rejected 189 proposed redactions that appeared on 78 pages of the record. *Compare* CP 321-330 to 438-579. In addition, the court specifically said that the order it would sign, “will be silent on the scope of the injunction in that it is not going to expressly say that it applies to future requests, but that it’s not going to expressly say that it doesn’t apply to future requests.” VRP 13:7-10, April 29, 2016.

On May 13, 2016, the trial court entered its permanent injunction order. CP at 321-330. After entry of this order, Doe never filed a motion to stay pending her appeal of the order. As a result, WDFW provided Loomis his requested documents, consistent with the court approved redactions of the May 13, 2016, order.

IV. ARGUMENT

A. Standard of Review

Judicial review of agency action under the PRA, including application of an exemption, is de novo. RCW 42.56.550(3). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799, 809 (2013). In this case, that burden of proof falls on Doe. A trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000).

B. Interpretation of the PRA

The PRA “is a strongly worded mandate for the broad disclosure of public records.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 603, 963 P.2d 869, 873 (1998). The PRA is to be “liberally construed and its exemptions narrowly construed . . . to assure that the public interest will be fully protected.” RCW 42.56.030; *Doe I v. Wash. State Patrol*, 80 Wn. App. 296, 300, 908 P.2d 914, 917 (1996). Courts are to take into account the PRA’s policy, “that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to *public officials or others*.” RCW 42.56.550(3)

(emphasis added); *Doe I*, at 300. RCW 42.56.060 supports disclosure of documents by providing that no agency shall be liable, nor shall any cause of action exist for the good faith release of a public record by an agency. In contrast, if an agency does not disclose public records it may be penalized in an amount not to exceed \$100 per day and required to pay attorney's fees and costs. RCW 42.56.550(4).

C. Legal Requirements for Injunctive Relief

In general, a trial court's decision whether to grant an injunction is reviewed for abuse of discretion. *Kucera*, 140 Wn.2d at 209. The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, is manifestly unreasonable, or is arbitrary. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160, 169 (1994). To obtain injunctive relief—preliminary or permanent—the movant must establish the same three basic requirements: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right by the entity against which it seeks the injunction; and (3) the acts about which it complains are either resulting or will result in actual and substantial injury. *Kucera*, 140 Wn.2d at 200. If the movant fails to satisfy any one of these three requirements, the injunction generally should be denied. *Federal Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946, 948 (1986).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court's power to enjoin production of a record under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190, 194 (2011). "Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905, 910 (2014).

D. The Trial Court Did Not Err in Determining Not to Redact Doe's Identity Everywhere It Appeared in the Requested Records

The trial court correctly refused to accept Doe's argument that her identity must be redacted from every place it appeared in WDFW's investigative records. Her argument is untenable when squared with the purpose behind the PRA and the holding in *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 907, 346 P.3d 737, 742 (2015): "We do not read *Bellevue John Does* to create a sweeping rule that exempts an employee's identity from disclosure any time it is mentioned in a record with some tangential relation to misconduct allegations." (citing *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008)).

Much of the information Doe seeks to redact is innocuous at the least or embarrassing at the most. CP at 445, 448, 451, 554, 557, 573, and 575. Further, said statements about her conduct were substantiated by multiple WDFW witnesses and she conceded that only “some of those reports were false.” CP at 10.

Doe also asserts that the trial court erred in applying RCW 42.56.050 too narrowly because the court analyzed a right to privacy on a per-page basis rather than the record as a whole.⁸ She cites *Predisik* for the proposition that “agencies and courts must review each responsive record and discern from its four corners whether the record discloses factual allegations that are truly of a private nature.” *Predisik* 182 Wn.2d at 906.

Doe’s argument on appeal that each redaction must be evaluated in the context of the entire record in which it appears was not argued in the trial court and is inconsistent with her argument in that court. In the trial court, Doe consistently argued that the validity of *all* her proposed redactions could be determined by reviewing isolated examples of proposed redactions which were devoid of context and randomly selected from pages in the record. CP at 30-31. She submitted bits and pieces of the Schirato/Larson investigative report, Schirato’s pre-disciplinary letter,

⁸ WDFW is unaware of any statement by the trial court that it determined the underlying privacy interest on a per-page basis.

Schirato's discipline letter, Schirato's response, and fragments of numerous other records. *Compare* page numbering on CP at 438-579. The trial court rejected that approach and required Doe to submit more than just random examples of her proposed redactions. CP at 262-263.

The argument Doe now raises was not made in the trial court. Generally, an appellate court will not consider any claim of error that was not raised in the trial court. RAP 2.5(a). *See Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780, 819 P.2d 370, 374 (1991) (appellate court will not consider a theory as ground for reversal unless it was first presented to the trial court). The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) (rejecting appellant's attempt to argue for a different standard in a medical malpractice case on appeal than appellant argued in the trial court). That same rationale required Doe to inform the trial court of the rule of law she wanted that court to apply. *Id.*

Her argument now that the each redaction must be evaluated in light of the entire record in which it is found also is inconsistent with her argument in the trial court and should be barred by the doctrine of judicial estoppel. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an

advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13, 15 (2007) (citing *Bartley–Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)).

Based upon the documents Doe submitted, the trial court carefully reviewed each of the 141 pages and determined not all of her proposed redactions implicated a privacy interest. That approach and that result is consistent with our Supreme Court’s articulation of the privacy rule:

We do not read *Bellevue John Does*⁹ to create a sweeping rule that exempts an employee’s identity from disclosure any time it is mentioned in a record with some tangential relation to misconduct allegations. A rule that broad would justify withholding, or at least redacting, nearly every record created during the course of the District’s investigation. Even *Bellevue John Does* recognizes the PRA entitles the public to “documents concerning the nature of the allegations and reports related to the investigation and its outcome.” *Id.* at 221, 189 P.3d 139.

Predisik, 182 Wn.2d 896, at 907.

The trial court did not abuse its discretion by refusing to redact Doe’s name every time it is mentioned in a record, no matter how tangential its relation to misconduct allegations.

⁹ In *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008), the Court addressed public disclosure of records containing allegations of sexual misconduct by a public school teacher. The Court held that a teacher’s identity should be released under the PRA only when alleged sexual misconduct has been substantiated or when that teacher’s conduct results in some form of discipline, even if only a reprimand. *Id.* at 227.

E. The Trial Court Did Not Err by Remaining Silent as to Whether Its May 13, 2016, Injunction Applied to All Future Requesters

The trial court declined to make an express ruling that the May 13, 2016, injunction would apply to all future public records requesters. Instead, the court merely stated in its oral ruling that it would remain silent as to whether the injunction applied to future requesters or not. VRP 13:6-10, April 29, 2016. The trial court's statement is consistent with RCW 42.56.540. Doe cites no authority for her premise that an injunction under RCW 42.56.540 applies to any and all future requests for documents. To the contrary, published decisions uniformly address the application of RCW 42.56.540 only as to whether to enjoin the release of specific records or information in response to a specific *existing* public record request. *See, e.g., Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905, 910 (2014) (“*If an agency intends to produce records to a requester under the PRA, a person who is named in the record or to whom the record specifically pertains, may seek a judicial determination that the records are exempt from production. RCW 42.56.540[.]*” (emphasis added)); *King County Dep't of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 350, 254 P.3d 927 (2011) (“[P]ersons named in a request for records or to whom the requested record specifically pertains, may move to enjoin the release of the

requested records under RCW 42.56.540[.]” (emphasis added)), *review denied*, 175 Wn.2d 1006, 285 P.3d 885 (2012), *cert. denied*, U.S. 133 S. Ct. 1732, 185 L. Ed. 2d 793 (2013).

In other words, before RCW 42.56.540 is implicated, there must be a pending request for identifiable public records. The applicability of potential exemptions and any asserted privacy interest must be assessed in the context of that request. Indeed, the applicability exemptions may change over time, so that a record may be exempt from production at one time but available upon request at a later time. *See, e.g., Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 402, 314 P.3d 1093, 1105 (2013) (effective law enforcement exemption in RCW 42.56.240(1) ceases to apply categorically to investigative records once the case is first referred to a prosecutor for a charging decision); *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 257, 884 P.2d 592, 600 (1994) (deliberative process exemption in RCW 42.56.550(3) ends once the policies or recommendations are implemented). It would be an error for a trial court to consider one pending request for records as speaking for all potential future requesters.

Here, Doe appears to understand the need to have an active public record request as a requisite for judicial review, since counsel for Doe pressured Loomis into refusing to amend his PRA request, doing so in

direct contravention of the trial court's direction.¹⁰ In fact, the trial court observed this very fact when it said to Doe's counsel, "I'm troubled that it seems that the plaintiff is trying to keep the case alive after the court indicated that it appeared that it was moot." VRP 11:21-23, Jan. 15, 2016. But for Doe's counsel's insistence that Loomis not amend his request, Doe's claim would have been moot in January 2016.

F. The Trial Court Did Not Abuse Its Discretion by Denying Doe's Request for an Award of Attorney's Fees Under RCW 4.84.185

RCW 4.84.185 authorizes the trial court to award the prevailing party reasonable expenses including attorney's fees, incurred in opposing a frivolous action. *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698, 703 (2001). Such an award is available only when the action as a whole can be deemed frivolous. *Koch* at 510. "An appeal is frivolous only 'if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.'" *Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200 (1997) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455–56, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985)). Determination of a trial court's ruling under RCW 4.84.185 is reviewed for an abuse of discretion. *Koch* at 510.

¹⁰ In the trial court, Doe through counsel, instructed Loomis to not amend his PRA request because that action would moot the current proceeding. CP at 129, 215.

Doe's claim for attorney's fees and costs was not properly preserved for this appeal. In her notice of appeal, Doe sought review only of "the Permanent Injunction, entered with this Court on May 13, 2016. A copy of the referenced Order is attached." CP at 331. The referenced order says nothing about Doe's request for attorney's fees, or that the trial court denied the request. Additionally, Doe's opening brief fails to identify any trial court order denying attorney fees or the basis on which the trial court denied her request. Without those documents, this Court has no basis to determine whether the trial court abused its discretion regarding a request for attorney's fees and costs.

In the alternative, if this Court were to consider Doe's request for attorney's fees, the assignment of error fails as a matter of law because WDFW's defense as a whole cannot be deemed frivolous. The merits of WDFW's defense is clearly borne out, both by the arguments in this brief, and by the trial court's careful *in camera* review leading to a reasoned conclusion that some of Doe's proposed redactions are so tangential to misconduct allegations as to fall outside of any privacy protection afforded under RCW 42.56.050.

If any action should have been determined frivolous, it is Doe's. At every stage in the proceedings below, Doe consistently argued that every reference to her identity and/or association must be redacted from the

record and that such redactions must apply to all future requests of the disputed records. In a sense, she argued that the PRA allows for all references to a state employee to be deleted from a public record. This argument is flatly contrary to the clear command of the PRA that exemptions are to be narrowly construed in favor of disclosure. RCW 42.56.030.

In an effort to argue for attorney's fees, Doe alleges WDFW's proposed redactions were inconsistent within the record and motivated by malice and retaliation against Doe.

The inconsistent redaction allegation is purely misplaced. Doe cites CP 439 and 440 in an attempt to demonstrate how WDFW protected other employees' privacy, but not hers. WDFW never intended CP 439 to be produced in that form. CP 295 and 299-304.

Likewise, Doe's argument that WDFW's redactions were motivated by malice and/or retaliation against her is without merit. She references an email written by counsel, CP at 244, but the email merely outlines the predicament WDFW found itself in after the investigation was concluded and it had received a PRA request from Loomis. Whether or not the alleged misconduct was true, WDFW was obligated to respond to the PRA request. WDFW's reference to Schirato and Doe was solely for the purpose of explaining to opposing counsel that had his client and

Schirato exhibited greater discretion in their workplace conversation, the content of the investigative records would have been different.

Finally, Doe claims she is entitled to attorney's fees and costs because she incurred "large amounts of legal fees to obtain the protection of her privacy." As explained above, it was Doe who unnecessarily and repeatedly prolonged this action. But in any event, RCW 42.56.540 does not authorize the award of attorney fees to a person bringing an injunction (even had the motion for an injunction been successful), and RCW 42.56.060 bars any cause of action against an agency for the release of requested public records in a good faith attempt to comply with the PRA. There is no basis on which to award attorney fees to Doe.

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V. CONCLUSION

This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 25th day of August, 2017.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Thomas R. Knoll, Jr.", written in dark ink.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3 day of August, 2017, at Olympia, WA.



STACEY MCGAHEY

APPENDIX A

Page Number	Description	Basis	Sample?	Plaintiff Notes	Court Notes
2015-09-24 014	Schirato Disciplinary letter, May 27, 2015, p. 2	sexual orientation and sexual discussion			
2015-09-09 038	Schirato Disciplinary letter, May 27, 2015, p. 2	sexual orientation and sexual discussion		DFW redacts names associated with sexual comments, but not reference to Jane Doe by association	
2015-09-24 144	Schirato Disciplinary letter, May 27, 2015, p. 2	sexual orientation and sexual discussion	Ex. A, p. 2	DFW redacts names associated with sexual comments, but not reference to Jane Doe by association	
→ Replaced with Bates # B000003					
2015-09-24 015	Schirato Disciplinary letter, May 27, 2015, p. 3	offensive sexual reference			
2015-09-24 145	Schirato Disciplinary letter, May 27, 2015, p. 3	offensive sexual reference	Ex. A, p. 3		
2015-09-09 039	Schirato Disciplinary letter, May 27, 2015, p. 3	offensive sexual reference		DFW redacts references to Jane Doe by association	
2015-09-24 022	WDFW investigative report, p. 3	links Jane Doe to Schirato's sexual conduct			
2015-09-24 026	WDFW investigative report, p. 7	links Jane Doe to Schirato's sexual conduct			
2015-09-24 027	WDFW investigative report, p. 8	sexual and non-work related comments			
2015-09-09 254	WDFW investigative report, p. 8	sexual and non-work related comments	Ex. A, p. 5		
2015-09-24 028	WDFW investigative report, p. 9	offensive sexual reference			
2015-09-09 255	WDFW investigative report, p. 9	offensive sexual reference	Ex. A, p. 6		
2015-09-24 034	WDFW investigative report, p. 15	non work related			
2015-09-24 036	WDFW investigative report, p. 17	offensive sexual reference		elsewhere DFW redacts reference to Jane Doe by association in connection with with pole dancing and swinger references, why not here?	
2015-09-09 263	WDFW investigative report, p. 17	offensive sexual reference	Ex. A, p. 7	elsewhere DFW redacts reference to Jane Doe by association in connection with with pole dancing and swinger references, why not here?	
→ Replaced with Bates # A000020					
2015-09-24 037	WDFW investigative report, p. 18	offensive sexual reference, nonwork		elsewhere DFW redacts reference to Jane Doe by association in connection with hot tub reference, why not here?	
2015-09-09 264	WDFW investigative report, p. 18	offensive sexual reference, nonwork	Ex. A, p. 8	DFW redacted all names associated with sexual comments except Schirato, but left references to Jane Doe by association	
→ Replaced with Bates # A000021					
2015-09-24 101	Schirato Termination letter, June 12, 2015, p. 3	and nonwork related			
2015-09-24 114	Schirato Termination letter, June 12, 2015, p. 3	and nonwork related			
2015-09-24 125	Schirato Termination letter, June 12, 2015, p. 3	and nonwork related			
2015-09-24 221	Schirato Termination letter, June 12, 2015, p. 3	and nonwork related			

Page Number	Description	Basis	Sample?	Plaintiff Notes	Court Notes
2015-09-09 015	Schirato Termination letter, June 12, 2015, p. 3	offensive sexual material, non work			
2015-09-24 102	Schirato Termination letter, June 12, 2015, p. 4	offensive sexual material			
2015-09-24 115	Schirato Termination letter, June 12, 2015, p. 4			DFW redacts names associated with sexual comments, but not Jane Doe	
2015-09-24 126	Schirato Termination letter, June 12, 2015, p. 4	offensive sexual material			
2015-09-24 222	Schirato Termination letter, June 12, 2015, p. 4	offensive sexual material		DFW redacts names associated with sexual comments, but not Jane Doe	
2015-09-09 016	Schirato Termination letter, June 12, 2015, p. 4	offensive sexual material			
2015-09-24 104	Schirato Termination letter, June 12, 2015, p. 6	offensive sexual material			
2015-09-24 117	Schirato Termination letter, June 12, 2015, p. 6	offensive sexual material		DFW redacts names associated with sexual comments; inconsistent redaction of references to Jane Doe	
2015-09-24 128	Schirato Termination letter, June 12, 2015, p. 6	offensive sexual material			
2015-09-24 224	Schirato Termination letter, June 12, 2015, p. 6	offensive sexual material		DFW redacts names associated with sexual comments; inconsistent redaction of references to Jane Doe	
2015-09-09 018	Schirato Termination letter, June 12, 2015, p. 6	offensive sexual material		DFW redacts names associated with sexual comments; inconsistent redaction of references to Jane Doe	
→ Replaced with Bates # C 000006					
2015-09-24 105	Schirato Termination letter, June 12, 2015, p. 7	offensive sexual material			
2015-09-24 118	Schirato Termination letter, June 12, 2015, p. 7	offensive sexual material		DFW redacted multiple names, including Jane Doe (but missed one)	
2015-09-24 129	Schirato Termination letter, June 12, 2015, p. 7	offensive sexual material			
2015-09-24 225	Schirato Termination letter, June 12, 2015, p. 7	offensive sexual material		DFW redacted multiple names, including Jane Doe (but missed one)	
2015-09-09 019	Schirato Termination letter, June 12, 2015, p. 7	offensive sexual material		DFW redacted multiple names, including Jane Doe (but missed one)	
2015-09-24 633	Pozzanghera Interview, p. 4	sexual			
2015-09-24 635	Pozzanghera Interview, p. 6				
2015-09-09 166	Pozzanghera Interview, p. 6	sexually offensive, nonwork			
2015-09-24 650	Murphy interview, p. 2	partying, non work			
2015-09-09 149	Murphy interview, p. 2	partying, non work			
2015-09-24 670	Robinette Interview, p. 4	non work related			
2015-09-09 183	Robinette Interview, p. 4	non work related			
2015-09-24 751	Cunningham interview, p. 5		Ex. A, p. 15		
2015-09-09 085	Cunningham interview, p. 5				

Page Number	Description	Basis	Sample?	Plaintiff Notes	Court Notes
2015-09-24 658	Martorello Interview, p. 4	sexually offensive	Ex. A, p. 12		
2015-09-09 142	Martorello Interview, p. 4	sexually offensive, nonwork			
2015-09-24 673	Rowe Interview, p. 2	sexual and non-work related comments	Ex. A, p. 16	continuation of redaction from 2015-09-09 187	
2015-09-09 186	Rowe Interview, p. 2	sexual and non-work related comments			
2015-09-24 674	Rowe Interview, p. 3	sexual and non-work related comments	Ex. A, p. 10		
2015-09-09 187	Rowe Interview, p. 3	sexual and non-work related comments			
2015-09-09 188	Rowe Interview, p. 4				
2015-09-24 690	Ware Interview, p. 2	non work related			
2015-09-09 200	Ware Interview, p. 2	non work related			
2015-09-24 702	Davis Interview, p. 4				
2015-09-09 090	Davis Interview, p. 4				
2015-09-24 703	Davis Interview, p. 5	offensive sexual, non work related			
2015-09-09 091	Davis Interview, p. 5	offensive sexual, non work related			
2015-09-24 704	Davis Interview, p. 6				
2015-09-09 092	Davis Interview, p. 6				
2015-09-24 705	Davis Interview, p. 7				
2015-09-09 093	Davis Interview, p. 7				
2015-09-24 734	Culver Interview, p. 4	sexual and non-work related comments			
2015-09-09 068	Culver Interview, p. 4	sexual and non-work related comments			
2015-09-24 735	Culver Interview, p. 5	sexual and non-work related comments			
2015-09-09 069	Culver Interview, p. 5	sexual and non-work related comments			
2015-09-24 736	Culver Interview, p. 6	sexual and non-work related comments			
2015-09-09 070	Culver Interview, p. 6	sexual and non-work related comments			
2015-09-24 740	Culver Interview, p. 10	sexual and non-work related comments			
2015-09-09 074	Culver Interview, p. 10	sexual and non-work related comments			
2015-09-24 742	Culver Interview, p. 12	sexual and non-work related comments			
2015-09-09 076	Culver Interview, p. 12	sexual and non-work related comments			
2015-09-24 743	Culver Interview, p. 13	sexual and non-work related comments			
2015-09-09 077	Culver Interview, p. 13	sexual and non-work related comments			
2015-09-24 744	Culver Interview, p. 14	sexual and non-work related comments			
2015-09-09 078	Culver Interview, p. 14	sexual and non-work related comments			
2015-09-24 745	Culver Interview, p. 15	sexual and non-work related comments			
2015-09-09 079	Culver Interview, p. 15	sexual and non-work related comments			

Page Number	Description	Basis	Sample?	Plaintiff Notes	Court Notes
2015-09-09 197	Stohr interview, p. 6	non work related			
2015-09-09 154	Pamplin Interview, p. 5	non work related			
2015-09-09 099	Giglio Interview, p. 5	sexual and non-work related comments			
2015-09-09 107	Henson Interview, p. 2				
2015-09-09 110	Henson Interview, p. 5				
2015-09-09 111	Henson Interview, p. 6	sexually offensive			
2015-09-09 103	Guzlas Interview, p. 3				
2015-09-09 104	Guzlas Interview, p. 4	paragraph sexually offensive, nonwork	Ex. A, p. 11		
2015-09-09 105	Guzlas Interview, p. 5	non work related			
2015-09-09 121	Larson Interview, p. 2	paragraph sexually offensive, nonwork	Ex. A, p. 19		
2015-09-09 122	Larson Interview, p. 3	non work related	Ex. A, p. 20	DFW redacted names associated with sexual comments and an entire paragraph of unknown content.	
2015-09-09 123	Larson Interview, p. 4	sexually offensive, nonwork	Ex. A, p. 21		
2015-09-09 124	Larson Interview, p. 5	sexually offensive, nonwork	Ex. A, p. 22		
2015-09-09 125	Larson Interview, p. 6	sexually offensive, nonwork	Ex. A, p. 23		
2015-09-09 126	Larson Interview, p. 7	sexually offensive, nonwork		DFW appears to have redacted an entire paragraph of unknown content	
2015-09-09 127	Larson Interview, p. 8	sexually offensive, nonwork		DFW redacted multiple lines of unknown content	
2015-09-09 170	Quan interview, p. 3	sexually offensive, nonwork	Ex. A, p. 13		
2015-09-09 171	Quan interview, p. 4	sexually offensive, nonwork	Ex. A, p. 14	DFW redacted other names associated with sexual conduct, but not Jane Doe	
2015-09-09 172	Quan interview, p. 5	sexually offensive, nonwork			
2015-09-09 173	Quan interview, p. 6	sexually offensive, nonwork			
2015-09-09 174	Quan interview, p. 7	non work related			
2015-09-09 210	Schirato interview, p. 3	sexually offensive, nonwork			
2015-09-09 211	Schirato interview, p. 4	non work related			
2015-09-09 212	Schirato interview, p. 5	sexually offensive, nonwork			
2015-09-09 214	Schirato interview, p. 7	sexually offensive, nonwork		DFW redacted other names associated with sexual comments	
2015-09-09 217	Schirato interview, p. 10	sexually offensive, nonwork			
2015-09-09 221	Schirato interview, p. 14	sexually offensive, nonwork			
2015-09-09 229	Schirato interview, p. 22	sexually offensive, nonwork	Ex. A, p. 18		

Page Number	Description	Basis	Sample?	Plaintiff Notes	Court Notes
2015-09-24 936	Schirato Response	sexually offensive non work	Ex. A, p. 24	DFW redacts other names associated with sexual comments, but not Jane Doe DFW redacts other names associated with sexual comments, but not Jane Doe DFW redacts other names associated with sexual comments, but not Jane Doe DFW redacts other names associated with sexual comments, but not Jane Doe	
2015-09-24 959	Schirato response w/some redaction	sexually offensive non work			
2015-09-09 278	Schirato response	sexually offensive non work			
2015-09-24 937	Schirato Response	sexual, inconsistent redaction			
2015-09-24 960	Schirato response w/some redaction	sexual, inconsistent redaction			
2015-09-09 279	Schirato response	sexual, inconsistent redaction			
2015-09-24 939	Schirato Response	sexually offensive non work			
2015-09-24 962	Schirato response w/some redaction	sexually offensive non work			
2015-09-09 281	Schirato response	sexually offensive non work			
2015-09-24 942	Schirato Response	non work related			
2015-09-24 965	Schirato response w/some redaction	non work related	Ex. A, p. 25	DFW redacts Schirato's name related to sexual orientation (swinging, bisexual) but not Jane Doe DFW redacts Schirato's name related to sexual orientation (swinging, bisexual) but not Jane Doe DFW redacts other names associated with sexual conduct, but not Jane Doe DFW redacts other names associated with sexual conduct, but not Jane Doe DFW redacted names from the Burning Man incident in other documents, but not here DFW redacted names from the Burning Man incident in other documents, but not here DFW redacted names from the Burning Man incident in other documents, but not here	
2015-09-09 284	Schirato response	non work related			
2015-09-24 945	Schirato Response	sexually offensive			
2015-09-24 968	Schirato response w/some redaction	sexually offensive			
2015-09-09 287	Schirato response	sexually offensive			
2015-09-24 946	Schirato Response	sexually offensive non work			
2015-09-24 969	Schirato response w/some redaction	sexually offensive non work			
2015-09-09 288	Schirato response	sexually offensive non work			
2015-09-24 948	Schirato Response	sexually offensive non work			
2015-09-24 971	Schirato response w/some redaction	sexually offensive non work			
2015-09-09 290	Schirato response	sexually offensive non work			
2015-09-24 953	Schirato Response	sexually offensive non work			

Page Number	Description	Basis	Sample?	Plaintiff Notes	Court Notes
2015-09-24 976	Schirato response w/some redaction	sexually offensive non work		DFW redacts names associated with explicit descriptions of sexual conduct, but fails to redact multiple instances of Jane Doe's name associating her with that and other conduct	
2015-09-09 295	Schirato response	sexually offensive non work	Ex. A, p. 26	DFW redacts names associated with explicit descriptions of sexual conduct, but fails to redact multiple instances of Jane Doe's name associating her with that and other conduct	
2015-09-24 954	Schirato Response	sexually offensive non work			
2015-09-24 977	Schirato response w/some redaction	sexually offensive non work			
2015-09-09 296	Schirato response	sexually offensive non work			
2015-09-24 759	Colvin Handwritten Notes, Jennifer Quan	sexual and non-work related comments		DFW redacts names associated with pole dancing, hot tub, and no panties	
2015-09-09 298	Colvin Handwritten Notes, Jennifer Quan	sexually offensive non work		DFW redacts names associated with pole dancing, hot tub, and no panties	
2015-09-24 760	Colvin Notes	sexual and non-work related comments			
2015-09-09 304	Colvin Notes	sexually offensive non work	Ex. A, p. 28		
2015-09-09 027	Colvin Notes	offensive sexual material, non work	Ex. A, p. 27		
2015-09-09 029	Colvin Notes	non work related			
2015-09-09 032	Colvin Notes	sexual and non-work related comments			

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